

July 8, 2005

Jonna A. Ward, President
Visionary Integration Professionals, Inc
80 Iron Point Circle, Suite 100
Folsom, CA 95630

**Re: Your Request for Advice
Our File No. A-05-096**

Dear Ms. Ward:

This letter is in response to your request for advice on behalf of Visionary Integration Professionals, Inc. (“VIP”) and its employee, Ms. Cheryl Hotaling regarding the post-governmental employment provisions of the Political Reform Act. (the “Act”).¹

QUESTION

May Ms. Hotaling represent or assist VIP in the request for proposal (“RFP”), HHSDC 4130-141A issued by the state on April 18, 2005, regarding the Case Management Information and Payroll Systems (“CMIPS II”) procurement proceeding?

CONCLUSION

No. The lifetime ban on “switching sides” in sections 87401 and 87402 prohibits Ms. Hotaling from representing or assisting VIP in the RFP HHSDC 4130-141A proceeding. This prohibition extends only to the RFP process and would not prohibit Ms. Hotaling from participating later in the implementation of the contract, should the contract be awarded to VIP.

FACTS

Your request is a follow up question with regard to prior advice you received, (*Ward Advice Letter*, No. A-03-283), details of which are incorporated herein by reference.²

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

You have provided the following additional information:

On March 27, 2003, Ms. Hotaling completed her engagement with the California Health and Human Service Data Center (“HHSDC”) related to the original proceeding of Case Management and Payroll Systems (CMIPS II). On November 19, 2003, Visionary Integration Professionals (VIP) requested a formal interpretation related to the role that VIP and Ms. Cheryl Hotaling can play as it relates to the In-Home supportive Services (IHSS) and CMIPS II procurement. (You submitted your original letter seeking advice as well as the Commission’s response – *Ward* Advice Letter No. A-03-283, dated December 22, 2003 – with this current request.)

You stated in your letter that on January 16, 2004, the California Department of General Services (DGS) notified potential CMIPS II bidders that the procurement would not be released in January 2004 “due to recommendations that would significantly change the IHSS program and thus the scope of the CMIPS procurement.” The notification goes on to say that “when procurement is released, it will be considered a new proceeding.”

On April 8, 2005, the State of California released the current RFP for CMIPS II.

During a telephone conversation on May 26, 2005, staff requested additional information from you regarding the state’s RFP. Specifically, staff requested that you provide copies of the “draft” RFP that Ms. Hotaling reviewed in 2003 and the “new” RFP issued by the state in April 2005. The Commission received the requested materials on June 17, 2005. You stated in a letter dated June 15, 2005, that state RFPs contain “numerous sections with ‘boilerplate’ information dictated by the Statewide Information Management Manual. You also stated that the “unique” sections of RFPs are generally “Section 5 – Administrative Requirements; Section 6 – Technical Requirements, and Section 8 – Cost.” In addition, you state that particular attention should be paid to the above sections “to note the numerous differences when comparing the proceeding that included Ms. Hotaling’s involvement and the results of the new proceeding.”

You added that changes to the requirement for the RFP have been significant since Ms. Hotaling’s involvement two years ago, including:

- Changes brought about due to the consolidation of state data centers.
- The roles and responsibilities of the Bidder and the Counties related to county equipment.
- Requirements supporting Forms and Reporting Architecture.
- The entire costing model.

² Your previous letter stated that Ms. Hotaling was a former Eclipse Solutions, Inc. (“Eclipse”) employee who reviewed multiple drafts of the CMIPS II RFP and provided feedback and suggested changes. At the time of Ms. Hotaling’s employment with Eclipse in 2002 and 2003, Eclipse was under contract to the California Health and Human Service Data Center (“HHSDC”) to provide systems engineering and system acquisition support for CMIPS II RFP. HHSDC required Ms. Hotaling to file a form 700. Ms. Hotaling terminated her employment with Eclipse on July 28, 2003, when she became an employee of VIP.

- System maintenance requirements.
- Facilities requirements.
- Payroll management requirements.
- Optional enhancements.
- Interface requirements.

ANALYSIS

The Act contains three main post-governmental restrictions on individuals who have recently left public service:

One Year Ban: This would prohibit a public official from appearing for compensation before his or her former agency, or officer or employee thereof, for the purpose of influencing any administrative, legislative or other specified action (including contracts).

Permanent Ban: This rule prohibits a former state administrative official from advising or representing any person, other than the State of California, for compensation in any judicial, quasi-judicial or other proceeding in which the official participated in while in state service. (See Sections 87401-87402, regulation 18741.1); and

Restrictions on Negotiating Prospective Employment: Restrictions on a public official who is negotiating or has any arrangement concerning prospective employment (section 87407, regulation 18747).

However, since your question specifically involves restrictions pertaining to the permanent ban provisions of the Act, we only discuss that particular restriction.

The Permanent Ban

The permanent ban is a lifetime ban and applies to any judicial, quasi-judicial or other proceeding in which you participated while a state administrative official. (Sections 87401 and 87402.) In other words, a public official may never “switch sides” in a proceeding after leaving state service.

Sections 87401 and 87402 provide:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.” (Section 87401.)

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.” (Section 87402.)

Section 87400 defines “*state administrative agency*” as “every state office, department, division, bureau, board commission, but does not include the Legislature, the courts or any agency in the judicial branch of government.” A “*state administrative official*” is defined under this section as “every member, officer, employee or consultant of a state administrative agency who as apart of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely secretarial or ministerial capacity.”

As a consultant designated in the HHSDC conflict of interest code, Ms. Hotaling is a former state administrative official for purposes of the Act. Therefore she is subject to the permanent ban. (Section 87400(b).)

Proceedings

Section 87400(c) defines “judicial, quasi-judicial or other proceeding” to include: “...any proceeding, application, request for a ruling or other determination, *contract*, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency, including but not limited to any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.” It includes a proceeding in which state administrative officials participate, but leave state employment before the proceeding concludes.

Participation

Section 87400(d) defines “participated” as meaning “to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental agency staff which do not involve a specific party or parties.”

A state employee “participates in making a governmental decision” when he or she negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; advises or makes recommendations to the decision maker, either directly or without significant intervening substantive review; conducts research, makes an investigation, or prepares or presents any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the employee and the purpose of which is to influence the decision. (Regulation 18702.2, copy enclosed.)

Your letters of December 22, 2003, May 11, 2005 and June 15, 2005, indicate that Ms. Hotaling was one of the Eclipse employees who participated in the “draft” CMIPS II RFP process (a consultant with HHSDC) during calendar year 2002 and 2003. In your letter of December 22, 2003, you stated that Ms. Hotaling played a minor support role, reviewing, providing feedback and suggesting changes with regard to the CMIPS II RFP.

The fact that Ms. Hotaling had a support role in connection with the RFP means that she “participated” in this proceeding within the meaning of section 87400(d). Therefore, Ms. Hotaling would be prohibited from appearing before her own agency relative to this proceeding, and would also be prohibited from providing advice with regard to this proceeding.

New Proceeding

The permanent ban does not apply to a “new” proceeding, even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A “new” *proceeding* not subject to the permanent ban *typically involves different parties, a different subject matter, or different factual or legal issues* from those considered in previous proceedings. (*Donovan* Advice Letter, No. I-03-119.) We have found generally that proceedings to draft a plan or agreement are different from proceedings involving implementation of the same plan or agreement, or to amend the plan or agreement. For instance, the Commission considers the application, drafting and awarding of a contract, license or approval to be a proceeding separate from the monitoring and performance or implementation of the contract, license or approval. (*Blonien* Advice Letter, No. A-89-463; Reg. 18741.1.)

The issue presented in your most recent letter is whether CMIPS II RFP HHSDC 4130-141A, is the same proceeding as the “draft” RFP (which Ms. Hotaling had participated in) for purposes of the Act’s post-employment provisions. In order for Ms. Hotaling to represent VIP without violating sections 87401 and 87402, it would be necessary to find that the “new” RFP constitutes a new proceeding. If so, Ms. Hotaling would be able to represent VIP on the theory that she had not participated in these “new proceedings.”

In the past we have advised that if a *new contract* sent out for re-bid is *substantially the same as a current contract*, then the two contracts will be considered the

same proceeding for purposes of the permanent ban. (Anderson Advice Letter, No. A-98-159, enclosed.)

Your facts provide that the CMIPS II RFP was not released in January 2004 as was planned due to recommendations in the Governor's budget that could have some impact on the project. A "new" RFP was subsequently issued by the state on April 18, 2005. You provided copies of both RFPs (the "draft" RFP and the "new" RFP issued in April 2005).

The information you provided shows some changes in format, organization, wording and details. Some changes also involved addition of new information, especially with regard to cost considerations (Section 8), but they did not appear to change the general thrust and substance of the project.

The majority of the changes appear to merely flesh out or clarify the draft comments. For instance, point values were assigned or changed in certain sections – points which would be used in tallying scores to determine the winning bid. In addition, some areas (for example in Section 5 – Administrative Requirements) were condensed or eliminated, primarily because information covered was already provided in other sections of the RFP. Moreover, many of the requirements in the "draft" proposal were maintained in the "new" RFP.

Therefore, despite these changes, the two RFPs are *substantially similar* when viewed as a whole. The two RFPs involve the same party, the same subject matter, as well as strikingly similar factual issues. Furthermore, the "new" RFP is basically the same in organization and form to the "draft" version, with similar (if not identical) overall goals and objectives, and is for the purpose of procuring the same kind of service.

Thus, based on the facts you have provided, it appears that the CMIPS II RFP HHSDC 4130-141A is *not* a "new" proceeding for purposes of the post-governmental restrictions of the Act, and therefore part of Ms. Hotaling's permanent ban prohibitions.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

Enclosures

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